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# IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIFTH APPELLATE DISTRICT

DAVID A. McDANIEL,

Plaintiff and Appellant,

v.

JEAN SHIOMOTO, as Chief Deputy Director, etc.,

Defendant and Respondent.

F065334

(Super. Ct. No. VCU245645)

## **OPINION**

# THE COURT\*

APPEAL from a judgment of the Superior Court of Tulare County. Melinda M. Reed, Judge.

The Caine Law Firm and Christopher Caine for Plaintiff and Appellant.

Kamala D. Harris, Attorney General, Alicia M. B. Fowler, Assistant Attorney General, Scott H. Wyckoff and Loren E. Dieu, Deputy Attorneys General, for Defendant and Respondent.

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<sup>\*</sup> Before Cornell, Acting P.J., Poochigian, J. and Franson, J.

Appellant, David McDaniel, challenges the suspension of his driver's license by respondent, the Department of Motor Vehicles (DMV), following an administrative finding that appellant refused to take a chemical test to establish his blood alcohol level. According to appellant, substantial evidence does not support this finding. Appellant asserts that the only evidence introduced at the administrative hearing to show that he refused the test is the fact that he requested to see the phlebotomist's identification before the blood draw.

Contrary to appellant's position, the record supports the finding. Therefore, the judgment will be affirmed.

### **BACKGROUND**

At approximately 11:00 p.m., appellant was pulled over by a deputy sheriff. The deputy had noticed that appellant's brake lights were out. Because appellant exhibited signs of alcohol intoxication, the deputy placed appellant in the patrol car and requested the California Highway Patrol (CHP) to respond for an evaluation.

CHP Officer Beal arrived and administered a series of field sobriety tests to appellant. Appellant had trouble with the field tests and explained that he had broken his foot in the past. Appellant refused to take a preliminary alcohol screening test, but, before leaving the scene, appellant agreed to take a blood test.

Appellant was transported to a CHP office and the on-call phlebotomist was contacted to draw appellant's blood. At the office, appellant was taken into the briefing room.

At the administrative hearing, appellant testified that the briefing room was in disarray and did not appear to be hygienic. Appellant further testified that when the phlebotomist arrived, she was wearing sweat pants, a baggy t-shirt and tennis shoes and did not have a name tag. Based on the condition of the briefing room and the phlebotomist's appearance, appellant no longer wished to submit to the blood test. According to appellant, he asked the phlebotomist and then Beal to see the

phlebotomist's identification but no one responded. Beal then asked appellant if he was refusing to take the test. Appellant testified that he had a five minute conversation regarding the phlebotomist's identification that was not documented in Beal's report. Appellant explained that he merely wanted to ensure that his blood was drawn by a licensed phlebotomist.

When Beal testified at the administrative hearing, he contradicted appellant in several respects. Beal relayed that when they arrived at the CHP office, appellant stated he would no longer submit to the test because he wanted it done by a doctor at a nearby hospital. According to Beal, appellant stated he was not going to do the test at the CHP's "dirty ghetto office, with her," pointing to the phlebotomist.

The phlebotomist testified that she did not recall being called out to take appellant's blood but explained the procedure she follows. At the hearing, neither Beal nor the phlebotomist was questioned regarding the phlebotomist's identification or appellant's alleged request to see it.

Following the hearing, appellant's driver's license was suspended. The hearing officer concluded that appellant's conditional consent did not excuse him from taking the blood test and that appellant had refused to take the test. The hearing officer further found that the testimony given by the phlebotomist and by Beal was credible and that appellant's testimony was not credible.

Thereafter, appellant filed a petition for writ of mandate in the trial court.

Appellant argued that he did not refuse a chemical test but, rather, attempted to enforce his statutory right to have a qualified person perform the blood draw.

The trial court denied the writ. The court found that appellant's testimony concerning his request for the phlebotomist's identification was not credible and, there being nothing else in the record to support appellant's contention, there was no substantial evidence to support appellant's claim that he asked to see the phlebotomist's identification. After independently reviewing the record, the court found that the DMV

had proven, by a preponderance of the evidence, that appellant did unlawfully refuse to take a chemical test and thus, the suspension of his license was justified.

#### DISCUSSION

On review of the DMV's decision to suspend a license, the trial court exercises its independent judgment. (*Berlinghieri v. Department of Motor Vehicles* (1983) 33 Cal.3d 392, 398.) However, the appellate court must sustain the trial court's findings if substantial evidence supports them. (*Mann v. Department of Motor Vehicles* (1999) 76 Cal.App.4th 312, 320-321.) Accordingly, we must resolve all evidentiary conflicts and draw all legitimate inferences in favor of the trial court's decision and, where the evidence supports more than one inference, we may not substitute our deductions for those of the trial court. The trial court's factual findings may be overturned only if the evidence before the trial court is insufficient to sustain those findings as a matter of law. (*Lake v. Reed* (1997) 16 Cal.4th 448, 457.)

If a person is lawfully arrested for driving under the influence of alcohol, he or she is deemed to have given consent to a chemical test of his or her breath or blood to determine blood-alcohol content. (*Garcia v. Department of Motor Vehicles* (2010) 185 Cal.App.4th 73, 81.) A person who refuses to submit to, or fails to complete, such a chemical test is subject to suspension of his or her driving privileges. (*Ibid.*)

The driver's consent to a chemical test must be clear and unambiguous. Whether there is consent is determined by the objective, fair meaning of the driver's words and conduct, not his or her subjective state of mind. (*Carrey v. Department of Motor Vehicles* (1986) 183 Cal.App.3d 1265, 1270.) Moreover, if the consent is qualified or conditional, it will be deemed a refusal. (*Kesler v. Department of Motor Vehicles* (1969) 1 Cal.3d 74, 77.) For example, if a driver insists that his physician administer the test or that his physician or attorney be present during the test, that driver has refused the test. (*Id.* at pp. 77-78.)

Relying on *Ross v. Department of Motor Vehicles* (1990) 219 Cal.App.3d 398, appellant argues that he did not refuse the test but, rather, was merely asserting his statutory right to have his blood drawn by a qualified individual. In *Ross*, the court held that the driver's request to see the technician's identification before blood was drawn was not a refusal to submit to a chemical test. The driver was not conditioning his consent. He was invoking his statutory right to have blood drawn by only licensed, qualified individuals in a medically approved manner. (*Id.* at pp. 402-403.)

Here, appellant claims that he was not conditioning his consent but was asking to see the phlebotomist's identification. However, the trial court found appellant's testimony regarding this contention to not be credible. Rather, the trial court believed Beal's testimony that appellant conditioned his consent to the chemical test on the blood being drawn by a doctor at a hospital or medical facility rather than by the phlebotomist at the CHP office.

We must resolve this evidentiary conflict in favor of the trial court's decision. A conditional consent as found by the trial court is equivalent to a refusal. Accordingly, the trial court's decision is supported by substantial evidence.

## **DISPOSITION**

The judgment is affirmed. Costs on appeal are awarded to respondent.

<sup>&</sup>lt;sup>1</sup> That appellant eventually submitted to the test without physically resisting does not alter our conclusion. (*Payne v. Department of Motor Vehicles* (1991) 235 Cal.App.3d 1514, 1519).